81-2108

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PENNCO, INC. - - - - - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD - Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 12, 1982

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Where the Petitioner permanently replaced all striking employees, hired additional employees during the pendency of an economic strike and such replacement employees and newly hired employees crossed a picket line continuously which was the scene of numerous acts of violence resulting in a State Court issuance of a restraining order, is not the holding by the National Labor Relations Board as affirmed by the United States Court of Appeals for the Sixth Circuit that Petitioner engaged in an Unfair Labor Practice in violation of 29 *U.S.C.* 158(a), (1) and (5) when it withdrew recognition of the Communications Workers of America on the basis that it had a good faith doubt as to that union's continued representation of a majority of its employees in error?
2. When the Petitioner has demonstrated enough evidence to put the Petitioner in equipoise as suggested by the United States Court of Appeals for the Sixth Circuit has not the Petitioner satisfied its burden of proof sufficient to shift the burden of going forward to the National Labor Relations Board to prove that on the critical date the union still represented a majority of the employees of Petitioner?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

PENNCO, INC. - - - - - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Pennco, Inc.,[1] prays a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on March 16, 1982 which Judgment and opinion became final upon denial of a Motion for Rehearing by that Court on April 8, 1982.

OPINIONS BELOW

The final judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on March 16, 1982 and appears in the Appendix hereto. App. A, pp. 19-23. The denial of and the opinion upon the Petition for Rehearing to the United States Court of Appeals for the Sixth Circuit entered on April 8,

[1]Pennco, Inc., is a Kentucky corporation which has no subsidiaries or affiliates nor is it owned by any other corporation.

1982 appears in the Appendix hereto. App. B, p. 24. The original decision and order of the National Labor Relations Board dated May 23, 1979 appears in the Appendix hereto. App. C, pp. 25-39. The supplementary decision and order of the National Labor Relations Board dated July 18, 1980 appears in the Appendix. App. D, pp. 40-48.

JURISDICTION

The final judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this matter was entered on March 16, 1982. A timely Petition for Rehearing was denied on April 8, 1982. This Petition is filed within ninety (90) days of March 14, 1982 and of April 8, 1982. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

United States Code

National Labor Relations Act §158 (29 U.S.C. §158(a) (1) and (5)): Set out at Appendix E, pp. 49-50.

STATEMENT OF THE CASE

This matter is a request for relief from the final opinion and order of the United States Court of Appeals for the Sixth Circuit.

In the matter at bar the Petitioner, Pennco, Inc., (hereinafter referred to as "Pennco") was petitioned by the Communications Workers of America (herein-

after referred to as "CWA") seeking to represent an appropriate bargaining unit of Pennco employees. As the result of an election held October 21, 1976 CWA was certified by the National Labor Relations Board as the collective bargaining representative for the Pennco employees. That certification was based upon the winning of the election by the CWA 114 votes to 62 votes.

Shortly after November 1, 1976 collective bargaining was begun and continued through November 1, 1977. The stipulated record before the National Labor Relations Board indicated that numerous sessions were held prior to the intervention of the Federal Mediation and Conciliation Service and that subsequent to April 4, 1977, further sessions were held with the assistance of the Federal Mediation and Conciliation Service.[2]

Even though good faith bargaining was engaged in by Petitioner and by CWA, no collective bargaining agreement was reached between Pennco and CWA prior to the expiration of the one-year certification.[3]

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[2]The stipulated record filed below indicated that negotiating and bargaining sessions were held prior to the intervention of the Federal Mediation and Conciliation Service on seven occasions and subsequent to intervention with the assistance of the Service on five further occasions, the last being September 21, 1977.

The stipulated record below further indicates that on May 18, 1977 CWA and its employees commenced an economic strike at the production facility of Pennco. An attendant picket line was established and the strike and picket line continued through and including September 15, 1978 at which time CWA announced the termination of the strike.

[3]Pennco, Inc. has not quarreled with nor does it argue the principle that CWA was presumed to represent a majority of its employees during the one-year period from the date of certification.

Subsequent to the inception of an economic strike on May 18, 1977, Pennco sent notices to those striking employees that if they did not report to work they would be permanently replaced. Of the persons on strike 109 were so replaced.[4]

As indicated by the stipulated facts, the picket line was established May 18, 1977 and was present throughout the summer, fall and winter of 1977. During that time all of those persons on the payroll of Pennco after the strike began had to cross that picket line to report for work. The stipulated record indicates that there were incidents of violence and mass picketing that occurred between the date of May 18, 1977 and the issuance by the Boyd Circuit Court of Kentucky of a restraining order restraining numbers of pickets and prohibiting acts of violence on July 18, 1977.[5]

Pennco, in the meantime, continued to negotiate as it was required to do by the previous decisions of this Court and the National Labor Relations Act. During

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[4]Immediately prior to the strike the stipulated facts show that there were 173 bargaining unit members in the employment of Pennco and on the active payroll. 109 of those were permanently replaced and 62 crossed the picket line and returned to work. On June 11, 1977, the next pay period mentioned in the stipulated facts subsequent to the strike, there were 191 persons currently on the active payroll, i.e. employees actively working. This indicated that as of that date there were 191 persons crossing the picket line that was in existence.

[5]The verified complaint which was stipulated below indicated that there were numerous incidents of violence which caused both property damage and personal injury. The Boyd Circuit Court upon that basis issued its restraining order on July 18, 1977 limiting the number of pickets, prohibiting mass picketing at Petitioner's production facility and prohibiting further acts of violence.

that same time, Pennco increased its employee complement so that on November 3, 1977, a pay period stipulated to be immediately after the expiration of the one-year certification, Pennco had on its active payroll, i.e. employees actually working, 257 persons. Of these 257 employees only 47 had been on the payroll prior to the strike of May 18, 1977 and of those 47 only 28 had been employed on the date of the election, i.e. October 21, 1976. That number represented only slightly over 15 percent of those who had participated in that election in 1976. Based upon the number of employees replaced, the incidents on the picket line and the fact that the replacement employees and new employees had continued to cross the picket line and to perform production services for Pennco, the Petitioner herein refused to bargain further with CWA after one year elapsed on the grounds that it had a good faith doubt that the CWA continued to represent a majority of Petitioner's employee complement.

Subsequent thereto, the National Labor Relations Board filed Unfair Labor Practice charges against Petitioner alleging that the refusal to bargain was in violation of 29 U.S.C. §158(a), (1) and (5).[4] This was the only Unfair Practice charge filed with respect to the bargaining.

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[4]The Board further indicated that there was a failure to furnish a copy of a health insurance plan. It was stipulated at the hearing that if the Board and the Courts subsequently affirm the position of the National Labor Relations Board that the plan would be furnished.

The parties at a hearing on October 18, 1978 entered into a stipulated set of facts which were then submitted to the National Labor Relations Board. The Board issued an original decision on May 23, 1979. App. C, pp. 25-39. However, on its own motion, the Board decided to reconsider that decision and withdrew same requesting additional stipulated facts which were provided. Thereafter the Board rendered its second decision on July 18, 1980. App. D, pp. 40-48.

The holdings of the National Labor Relations Board found the Petitioner herein to be in violation of the National Labor Relations Act and of the commission of an Unfair Labor Practice. Notably the Board indicated:

> That an employee's return to work during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining representative. Absent supporting evidence it may mean no more than that he was forced to return to work for financial reasons or that he did not support that particular strike. Similarly, the Board, with Court approval, has held that a replacement hired for a striking employee cannot, without more, be presumed to reject the union as his bargaining representative. Such a worker also may be compelled to seek employment, or may disapprove of the strike in question but would support other union initiatives. Thus, in light of this uncertainty as to the reasons employees cross a picket line, Respondent's presumption alone is clearly not sufficient to rebut the presumption of majority status nor its corrollary that new em-

ployees, including strike replacements are presumed to support the union in the same ratio as those they replaced.

Board decision App. D, pp. 40-48.

Thereafter, the Board moved for an enforcement order from the United States Court of Appeals for the Sixth Circuit. That Court granted enforcement of the Board's order but did not agree with the precise Board holding below with respect to the presumptions of representation. The Court indicated that: "Instead, under the facts of this case, the evidence demonstrated by Pennco is sufficient only to put the parties in equipoise." — F. 2d at p. — (1982) App. A, pp. 19-23. The Court went on to indicate that "We leave to another day the case where picket line violence occurs close to the date of withdrawal." —— F. 2d at p. —— (1982). App. A., pp. 19-23.[7]

The Petitioner herein then filed a timely motion for reconsideration which was denied on April 8, 1982, App. B, p. 24, and then filed a timely motion pursuant to Federal Rules of Appellate Procedure 41(b) and United States Court of Appeals for the Sixth Circuit Rule 15(b) for a stay of the mandate pending this Petition for Writ of Certiorari to the United States Supreme Court. That motion was granted on April 16, 1982 staying the mandate of the United States Court of Appeals for the Sixth Circuit to and including the 16th day of May, 1982. App. F., p. 51.

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[7]The Court will observe that the picket line violence resulted in the issuance of the restraining order on July 18, 1977 and withdrawal of recognition occurred subsequent to November 3, 1977.

REASONS FOR GRANTING THE WRIT

I.

The National Labor Relations Board in Finding Petitioner in Violation of 29 U.S.C. 158(a)(1)(5) When Petitioner Withdrew Recognition of the Communication Workers of America by Applying to the Instant Case the Presumption That Striker Replacements and New Employees are Presumed to Support the Union in the Same Ratio as Those Whom They Have Replaced and the Subsequent Affirmation by the United States Court of Appeals for the Sixth Circuit of the Holding of the Board are Clearly Erroneous Where Such Employees Were Subjected to Violence, Harassment and Had to Cross a Picket Line to Work Each Day.

The National Labor Relations Board in its decision below asserted that the mere hiring of a number of new employees and replacements was meaningless inasmuch as the Board has long held that new employees are presumed to support the union in the same ratio as those whom they have replaced. *Laystrom Manufacturing Company,* 151 NLRB 1482 (1965) (enforcement denied on other grounds) 359 F. 2d 799 (7th Cir. 1966). The Court of Appeals for the Sixth Circuit, however, indicated that: ". . . We expressly decline to adopt either presumption for neither is justified under this set of stipulated facts." —— F. 2d ——, (1982). App. A, pp. 19-23.

What the Circuit Court indicated was that inasmuch as the picket line violence had ended some three and a half months prior to the withdrawal of recognition, they would not attribute to those who crossed the picket line any anti-union animus on the date of withdrawal

of recognition, i.e. November 3, 1977. The Court indicated through that: "We leave to another day the case where picket line violence occurs close to the day of withdrawal ___ F. 2d ___, (1982). App. A, pp. 19-23.

The Court in spite of its continued adherence to the decision of the National Labor Relations Board in *Stoner Rubber Company,* 123 NLRB 1440 (1959), and the principles set up therein, went on to enforce the order of the Board thus departing from its prior decisional law. The Court had previously adopted the reasoning of the Board in *Stoner Rubber Company* in its decision in *Automated Business Systems* v. *NLRB,* 497 F. 2d 262 (6th Cir. 1974) and had continued to adhere to that decision as shown in *NLRB* v. *Triplett Corporation,* 619 F. 2d 586 (6th Cir. 1980).

Stoner as in the instant case, clearly indicated that where a strike was in progress for some five months prior to the time of withdrawal of recognition, where no unfair labor practices were occurring and where permanent replacements for strikers and 18 former strikers were crossing a picket line to return to work it was not unreasonable to assume that those early returning strikers and replacements were not adherents of the union. Such reasoning was adopted in *Automated Business Systems, supra,* at 270-71. The Court here however in holding that Pennco was not entitled to rely upon the replacement of strikers, the violence that they were subjected to and the continued crossing of the picket line by those employees as any evidence of anti-union animus on the part of its complement of employees clearly departed from its holding in

Automated Business Systems and totally ignored the realities of the strike situation! The United States Court of Appeals for the 8th Circuit in *National Car Rental System, Inc.* v. *NLRB,* 594 F. 2d 1203 (1979) in quoting from R. Gorman, *Labor Law* 112 (1976) summed up the situation here quite precisely in stating:

> If a new hire agrees to serve as a replacement for a striker (in union parlence, a strike breaker, or worse) it is generally assumed that he does not support the union and that he ought not be counted toward a union majority. 594 F. 2d at 1206.

That statement sets forth the realities of the picket line and striker replacements that was present here. The strikers' replacement presumption cannot be justified by the rationale of the new employee presumption because the replacements and persons crossing a picket line did provide a reasonable basis for Pennco's good faith doubt of CWA's majority support!

As the record of this case currently stands, if this Petition for Writ of Certiorari is denied and Petitioner is not granted the relief sought, it will be in the position of having to bargain with a union whose members went on strike and were replaced by the Petitioner's current complement of employees who were subjected to violence, harassment and the continued presence of a picket line while performing employment services for the Petitioner! Clearly the first goal of CWA will be to cause the termination of the replacements and the reinstatement of the strikers! Accordingly, as the facts of this case do not indicate nor war-

rant the finding of an Unfair Labor Practice in the withdrawal of recognition under these circumstances this Court should grant the Petition for Writ of Certiorari.

II.

Where the Petitioner, Pennco, Inc., Demonstrated Enough Evidence to Put the Parties in "Equipoise" as Suggested by the Opinion of the United States Court of Appeals for the Sixth Circuit, the Petitioner Has Demonstrated Sufficient Evidence to Shift the Burden of Going Forward to the General Counsel for the National Labor Relations Board to Show That on the Date of Withdrawal, the Union Did in Fact Represent a Majority of Petitioner's Employees.

The Court below indicated that Pennco had demonstrated evidence on the record to put the parties in "equipoise." App. A, pp. 19-23. The Court, however, indicated that Pennco: "Would need some further evidence of union non-support in order to shift the burden to the Board to prove the union in fact had majority status on the critical day." App. A, pp. 19-23. This is a departure from previous holdings that followed the reasoning of the National Labor Relations Board as set out in *Stoner Rubber Company, supra,* to which the United States Court of Appeals for the Sixth Circuit had previously adhered. Particularly important is the holding in *Stoner Rubber Company* that:

> Proof of majority is peculiarly within the special confidence of the union. It may be proved by signed authorization cards, dues check-off cards, membership lists, or any other evidentiary means.

> An employer can hardly prove that a union no longer represents the majority since he does not have access to the union's membership list and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority, the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal to bargain date, the union in fact did represent a majority of the employees in the appropriate unit. See *Automated Business Systems Inc.* v. *NLRB*, 497 F. 2d at 270-71 quoting from *Stoner Rubber Company, supra.*

That is precisely the situation that Pennco found itself in! That is to say, that where Pennco had replaced strikers and witnessed the events on the picket line that the strike replacements and new employees were subjected to, these events demonstrated sufficient evidence to put the parties in equipoise. Therefore, since the General Counsel had access to facts that lie peculiarly within the knowledge of the union, he should have been required to go forward to show that on the critical date the union did represent a majority of Pennco employees. To so hold clearly would not provide a vehicle for the employer to "break the union" because, if in fact the General Counsel does go forward and proves a majority status then the employer no longer has any basis to doubt the majority status of the union and under prior decisional law must bargain for a reasonable period of time thereafter. *Rogers Manu-*

facturing Company v. *NLRB*, 487 F. 2d 644 (6th Cir. 1973).

Further this would have eliminated any question at all as to whether or not the interest of the replaced employees was, as indicated by this Court in *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240 (1939) and set out by the National Labor Relations Board in *Beacon Upholstery Co., Inc.*, 226 NLRB 207, 1976-77 CCH NLRB 29,159 (1976) "diametrically opposed to those of the strike replacements." For, as said by the Board in *Beacon Upholstery:*

> The interest of the discharged employees was diametrically opposed to those of the strike replacements. If the discharged employees return to work, the strike replacements would loose their jobs. Respondent was well aware of the situation and serious argument can be made that Respondent does have a reasonable basis for doubting that the strike replacements want the union to represent them. CCH NLRB at 29,162.

Had the Board gone forward and shown an actual majority on the date in question by use of the facts peculiarly within the knowledge of the union and the Board, no question could be raised.

That the Court below recognized that Pennco had placed this case in equipoise would, under the decision in *Soule Glass and Glazing Co.* v. *NLRB*, 652 F. 2d 1055 (1st Cir. 1981) be sufficient to shift the burden to the General Counsel. As stated by the Court in *Soule*: "Absent countervailing factors or the operation of some doctrine of estoppel, this objective numerical

factor alone is sufficient to support the company's withdrawal of recognition the union." 652 F. 2d at 1111.

No such estoppel or countervailing factors were present here!

Accordingly, as the opinion of the United States Court of Appeals for the Sixth Circuit shows Petitioner did demonstrate evidence to place the parties in "equipoise" the Court's opinion enforcing the Board's order is clearly erroneous and in violation of law and this Court should grant this Petition for Writ of Certiorari.

III.

Review Is Necessary to Clarify and Resolve Conflicts Between the Opinions of Four Federal Circuit Courts on the Issue of the Replacement of Strikers as That Relates to the Good Faith Doubt of an Employer as a Basis for Withdrawal of Recognition After the One Year Certification Period.

The National Labor Relations Board has held that, in the absence of objective evidence to the contrary, it is presumed that employees support a union in the same ratio as those they have replaced and that a high rate of turnover among current employees in both strike and non-strike situations will not alone provide a basis for an employer asserting a good faith doubt as to the union's continuing majority. See *Windham Community Memorial Hospital,* 320 NLRB 1070 (1977). The Second Circuit agreed with this position in its decision enforcing *Windham. NLRB* v. *Wind-*

ham Community Memorial Hospital, 577 F. 2d 805 (2d Cir. 1978). The United States Court of Appeals for the Fifth Circuit in *NLRB* v. *Randall Eastern Ambulance Service, Inc.*, 584 F. 2d 720 (1978) and the Eighth Circuit in *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203 (1979) have indicated their disagreement with this position and have held that it is unwarranted and unrealistic to engage in that presumption where the crossing of a picket line is involved.

In *National Car Rental System, Inc., supra*, National contended that it had a good faith doubt of the union's majority status based upon the following:

a. The company had only ten employees and all of those employees had been permanently replaced during an economic strike.
b. Each of the ten employees had to cross the picket line in order to make application for employment.
c. Each of the ten employees had to cross the picket line each day in order to work.
d. There was no showing at the hearing that the new employees were contacted by the union regarding their membership therein; and no showing that any of the new employees would support the union.

The Board presented no evidence directly bearing upon whether the union still had majority status relying upon the Board created rule set forth in a case decided by the Board after National notified the union of the good faith doubt of continued majority representation . . . 594 F. 2d at 1206.

The Eighth Circuit in denying enforcement of the Board's order stated that:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favor representation by the union even though they crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment . . . 594 F. 2d at 1206.

The United States Court of Appeals for the Fifth Circuit in *NLRB* v. *Randall Eastern Ambulance Service, Inc.*, 584 F. 2d 720 (1978) stated in setting out its position:

> At the commencement of this strike, March 31, the bargaining unit numbered 177, of whom 166 joined the strike. By June 7, however, the company was possessed of three items of objective evidence that, considered collectively, supported its doubt of the union's continued majority support.
>
> First, 46 of the original strikers had returned to work, and 10 had requested reinstatement and were on a preferential hiring list . . .
>
> Second, the company had hired 47 permanent replacements, of whom 6 had indicated disinterest in the union or had been the victims of picket line violence . . .
>
> If a new hire agrees to serve as a replacement for a striker (in union parlence, a strike breaker, or worse), it is generally assumed that he does not

> support the union and that he ought not to be counted toward a union majority . . . 584 F. 2d at 728.

Supporting this position is also the decision of the United States Court of Appeals for the First Circuit in *Soule Glass and Glazing Co.* v. *NLRB,* 652 F. 2d 1055 (1981) wherein that Court held that:

> Although mere high employee turnover is not a sufficient ground to negate a union's presumed majority status, the permanent replacement of striking employees presents a different situation. Striker replacements are: "generally assumed . . . not [to] support the union and . . . ought not to be counted toward union majority. When such strike breakers or permanent replacements constitute a majority of the unit, the presumption of the union majority is undermined." *Titan Metal Manufacturing Co.,* 135 NLRB 196 (1962). But in computing the total work force within which the majority is to be determined, the replaced economic strikers must be counted, at least during the first 12 months . . . 652 F. 2d at 1110.

There appears, as shown above, to be a disparity of opinion on this issue between the Circuit Courts because as stated in *Windham, supra,* "it cannot be presumed that the repudiation of the strike or the willingness to cross a picket line is also repudiation of the union as a bargaining agent . . ." 577 F. 2d at 814. The United States Court of Appeals for the Sixth Circuit in the instant case has, at least impliedly, sided with the Second Circuit position in *Windham* by granting an enforcement of the Board's order here.

Accordingly, it is appropriate for this Court to grant the Petition for Writ of Certiorari so that the conflict of opinions between the Federal Circuit Courts can be finally resolved by this Court.

CONCLUSION

For any one, or all of the reasons set forth above, minimally, a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-1654

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner,*

v.

PENNCO, INC., - - - - - - - *Respondent.*

ORDER—Filed March 16, 1982

BEFORE: BROWN and KENNEDY, Circuit Judges, CHURCHILL, District Judge*

The Board petitions for enforcement of its order requiring the respondent herein to bargain with the Communications Workers of America ("Union") and to cease and desist from unfair labor practices. All of the relevant facts were stipulated to by the parties below. The issue raised is whether the respondent demonstrated a good faith belief that the Union no longer represented a majority of Penneo's employees when it withdrew recognition of the Union. If the respondent failed to demonstrate this good faith belief, then it is admitted by both sides that the remedial measures ordered were within the range of options available to the Board.

On October 21, 1976, an election was held at the Pennco plant in Kentucky. The Union won that election by 114 to 62. The Union was certified by the Board on Novem-

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*The Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

ber 1, 1976. Negotiations for a new contract lasted from December, 1976 through September 21, 1977, at times with the assistance of a federal mediator. May 18, 1977, 109 employees began an economic strike and set up a picket line. The strike continued for all relevant times herein. The picket line engendered violence and property damage on more than one occasion and finally a restraining order was issued on July 18, 1977, preventing more than two picketers from picketing at any one time. Three and a half months later, on November 3, 1977, Penco withdrew recognition from the Union.

Before the strike began, there were 173 members of the bargaining unit. One hundred and nine employees struck. During the strike, Pennco advised striking employees that they would be permanently replaced. In addition to replacing striking workers, Pennco hired additional workers so that by November 3, 1977, the date of withdrawal, there were 257 employees on Pennco's payroll. Of these 257 employees, 47 were actively working on the date of the strike. The strike continued until September 15, 1978, when 42 strikers unconditionally offered to return to work.

The facts as outlined above constituted Pennco's claim that it entertained a good faith belief that the Union no longer represented a majority of the bargaining unit. Pennco argues that it is appropriate for it to conclude that the original employees who had all along crossed the picket line, and the employees who replaced the strikers, would not support a Union which fomented violence on a picket line they had to cross each morning. The number of replacements was greater than the number of strikers. Furthermore, Pennco argues, the interests of the two groups—strikers and workers—were diametrically opposite to one another since returning strikers would take the jobs of the replacements.

The Board, on the other hand, argues that it has always maintained a presumption that new hires support the union in the same percentage as those they have replaced and this case presents no justification for departing from that presumption. The Board also raises a number of policy arguments supporting its contentions, including the desirability of unfettered employee choice of a bargaining representative, stability of bargaining relationships and industrial stability. Finally, the Board correctly points out that the failure to join an economic strike may not indicate a lack of support for the union, but rather may demonstrate employees' economic concerns.

The broad contours of the law in this area are well settled. It is clear that a union is irrebuttably presumed to have majority status for one year following its certification. After the expiration of this year, a rebuttable presumption of majority status ensues. The employer is entitled to withdraw recognition in this period if he can show that the majority status is no longer valid or if he has a bona fide belief that the union no longer has the support of a majority of employees. *N.L.R.B.* v. *Windham*, 577 F. 2d 805 (2d Cir. 1978). This good faith belief must be supported by objective considerations which are clear, cogent, and convincing. However, subjective evidence may be used to bolster the argument that good faith doubts exist. *Pioneer Inn Associates* v. *N.L.R.B.*, 578 F. 2d 835, 839 (9th Cir. 1978). The relevant date to look to in determining the bona fides of the employer's doubts is the date that recognition is withdrawn; subsequent events cannot validate an improper withdrawal of recognition. *Windham, supra; N.L.R.B.* v. *Washington Manor, Inc.*, 519 F. 2d 750, 753 (6th Cir. 1975); *Rogers Manufacturing Co.* v. *N.L.R.B.*, 486 F. 2d 644, 647 (6th Cir. 1973), *cert. denied*, 416 U. S. 937 (1974). The question of the reasonableness

of the employer's doubts is one of fact. *Windham, supra,* at 811.

The Board, in arguing that the employer has not met his burden of demonstrating a good faith doubt, wishes to rely upon its presumption that new hires support the union in the same percentage as those they replaced. Pennco, in arguing that its evidence demonstrates a good faith doubt, wishes us to adopt a different presumption, that is, that new hires be presumed not to support a union when violence occurs on the picket line. We expressly decline to adopt either presumption for neither is justified under this set of stipulated facts. However, since we also find that Pennco has not adequately met its burden of demonstrating its good faith belief that the Union had lost its majority status, we enforce the Board's order.

Under the facts as stipulated, the picket line violence ended approximately three and a half months before the withdrawal of recognition. Thus, it is impossible to attribute to those who crossed the picket line an anti-union animus on November 3, 1977. In fact, we do not know how many of the 257 employees working on that date when recognition was withdrawn had been working during the violent picket line episode. We leave to another day the case where picket line violence occurs close to the day of withdrawal. Another distinctive factor in the instant case is the number of replacements that had been hired during the period of the strike. Of the 257 replacements, at most 109 would lose their job if the strike was settled. There is no indication that any particular persons in that work force of 257 knew that they would be replaced by a returned striker.

In summary, we do not adopt either one of the presumptions offered to us by the parties. *See Windham, supra,* at 813. Instead, under the facts of this case, the evidence demonstrated by Pennco is sufficient only to put

the parties in equipoise. Yet, equipoise is not enough for Pennco to demonstrate by objective evidence a good faith doubt as to the Union's majority status. Pennco would need some further evidence of union non-support in order to shift the burden to the Board to prove the Union in fact had majority status on the critical day. *See Automated Business Systems* v. *N.L.R.B.*, 497 F. 2d 262 (6th Cir. 1974).

Given the stipulated record in this case, we are of the opinion that the Board's order should be enforced.

Accordingly, it is ORDERED that the Board's order be enforced.

Entered by Order of the Court

(s) John P. Hehman, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-1654

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner*,

v.

PENNCO, INC., - - - - - - - *Respondent*.

ORDER DENYING PETITION FOR REHEARING—
Filed April 8, 1982

BEFORE: BROWN and KENNEDY, Circuit Judges; CHURCHILL,* District Judge.

Upon consideration of the petition for rehearing, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

Entered by Order of the Court

(s) John P. Hehman, Clerk

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*The Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

PENNCO, INC.
and
COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO } Case 9-CA-12040

DECISION AND ORDER

Upon a charge duly filed on December 19, 1977, by Communications Workers of America, AFL–CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, on May 5, 1978, issued and served on the parties a complaint and notice of hearing. In substance, the complaint alleges that Pennco, Inc., herein called Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to supply the Union with a copy of one of its two health insurance plans and by refusing to recognize or meet and bargain with the Union concerning a collective-bargaining agreement with the Union. On May 8, 1978, Respondent filed an answer admitting in part, and denying in part, the allegations in the complaint.

Thereafter, a hearing was conducted on October 18, 1978, before Administrative Law Judge James M. Fitzpatrick. At the hearing all parties entered into a stipulation in which they petitioned the Board to approve the transfer of this proceeding to the Board and waived the

making of findings of fact and conclusions of law by an Administrative Law Judge and the issuance of an Administrative Law Judge's Decision. The parties further stipulated that the entire record in this proceeding shall consist of the charge, the complaint, the answer, the stipulation with exhibits attached thereto, and the transcript of the proceeding. Thereafter, the parties filed a Motion to Transfer the Proceeding to the Board, Stipulation and Agreed Statement of Facts. On December 8, 1978, the Board granted the motion, approved the stipulation, and transferred the proceeding to the Board advising the parties to file briefs with the Board in Washington, D.C.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the stipulation, the briefs, and the entire record in this proceeding, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent, a Kentucky corporation, is engaged in the manufacture of aluminum doors and windows at its facility in Ashland, Kentucky. During the 12 months preceding the issuance of the complaint herein, a representative period, Respondent purchased and received goods and materials valued in excess of $50,000 which were shipped directly to its Ashland, Kentucky facility from points outside the Commonwealth of Kentucky.

The parties stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6)

and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The parties stipulated, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Stipulated Facts*

On August 23, 1976, the Union filed a petition with the National Labor Relations Board seeking certification as the exclusive representative of Respondent's production and maintenance employees. An election was held on October 21, 1976,[1] and on November 1, 1976, the Union was certified by the National Labor Relations Board as the exclusive representative of Respondent's production and maintenance employees in a unit appropriate for the purposes of collective bargaining with respect to wages, hours of employment, and other terms and conditions of employment.[2]

Prior to November 1976, there had been no collective-bargaining history between Respondent and the Union. Throughout that month, Respondent furnished the Union with preliminary bargaining information with respect to

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[1]The tally was 114 votes for, and 62 votes against, the Union with 5 challenged ballots, a number insufficient to affect the results.

[2]That unit was:

> All production and maintenance employees employed by the Employer at its Ashland, Kentucky, plant, including truck drivers, and lead people; but excluding all office clerical employees, confidential employees, technical employees, and all professional employees, guards and supervisors as defined in the Act.

wage scales, pension plans, insurance plans, names of employees, and other requested information. The parties held negotiating meetings on December 8, 1976, and January 13, February 1 and 10, March 4 and 16 and April 4, 1977. Subsequently, five more bargaining sessions were held in the presence of the Federal Mediation and Conciliation Service on April 25, May 17, June 3, August 22, and September 21, 1977.

On May 18, 1977, the Union began an economic strike against Respondent's Ashland plant and established a picket line. Picketing continued throughout the summer, fall, and winter of 1977. Incidents on the picket line occasioned the issuance of a restraining order by the Boyd Circuit Court of Boyd County, Kentucky.

After the strike began Respondent advised the employees that permanent replacements would be hired for those who did not return to work. During the last pay period prior to the strike, Respondent employed 173 bargaining unit members. By November 3, 1977, the pay period after the expiration of the one year certification period — and while the strike was still in progress — there were 257 employees in the bargaining unit on the payroll of whom 47 had been on the payroll prior to the commencement of the strike. Of these 47 employees, 28 employees were employed on the October 21, 1976, election date. All the employees working in Respondent's plant during the strike had to cross the Union's picket line.

Sometime in early November 1977, Respondent advised the mediator of the Federal Mediation and Conciliation Service that it had a good-faith doubt of the Union's current majority status in the unit based on the factual circumstances outlined above and that it would not negotiate further with the Union. The mediator relayed this information to the Union shortly thereafter. Respondent declined to attend a negotiating session scheduled for No-

vember 16, 1977, and has at all times since then refused to meet with the Union for the purpose of collective bargaining. Respondent further declined to accept, reject, or meet with the Union regarding a proposed contract sent to Respondent by the Union on November 29, 1977.

The strike continued until September 15, 1978, at which time the Union removed its pickets and 42 employees unconditionally offered to return to work. At no time between November 1, 1976, and the time of the hearing in this case did the Union abandon the bargaining unit or relinquish its interest in negotiating a collective-bargaining agreement on their behalf.

B. *Contentions of the Parties*

The General Counsel contends that the high turnover among Respondent's employees and the failure of some employees to observe the Union's picket line were not sufficient objective evidence to support Respondent's asserted good-faith doubt of the Union's majority at the time of its refusal to bargain. In support thereof, the General Counsel relies, *inter alia*, on *James W. Whitfield d/b/a Cutten Supermarket*, 220 NLRB 507 (1975), and *Windham Community Memorial Hospital and Hatch Hospital Corporation*, 230 NLRB 1070 (1977), enfd. 577 F. 2d 805 (2d Cir. 1978).

The General Counsel further contends that, inasmuch as Respondent has not established a sufficient basis for its asserted good-faith doubt, its refusal to recognize or meet and bargain with the Union concerning a collective-bargaining agreement constituted a violation of Section 8(a)(5) and (1) of the Act. Additionally, the General Counsel urges the Board to find, as alleged in the complaint, a second violation of Section 8(a)(5) and (1). In this regard, he relies on Respondent's stipulation at the hearing that if the Board should find that it did not have sufficient objective

evidence supportive of its asserted good-faith doubt, Respondent would admit that it refused to bargain with the Union by failing to furnish the Union a copy of one of its two health insurance plans, as requested by the Union, on or about July 8, 1977. Finally, the General Counsel argues, based on *Cavalier Division of Seeburg Corporation, and Cavalier Corporation*, 192 NLRB 290 (1971), *Cantor Bros., Inc.*, 203 NLRB 774 (1973), *Cutter Supermarket, supra*, and *Windham Community Memorial Hospital, supra*, that Respondent's alleged unfair labor practices converted the existing economic strike into an unfair labor practice strike as of November 5, 1977.

Respondent, on the other hand, contends that the employee turnover, coupled with the fact that replacement employees had to cross a picket line which had been the scene of violence, not only constitutes a sufficient basis for its asserted good-faith doubt of the Union's majority status, but also imposes on Respondent an obligation on behalf of its nonstriking employees to refuse to continue to recognize the Union. In this regard, Respondent argues that the evidence presented rebuts the presumption of the Union's majority status and, accordingly, the General Counsel has a burden, which Respondent asserts he had not met, to show that the Union represents a majority of Respondent's employees. Respondent notes that 16 months after the commencement of the strike herein only 42 striking employees unconditionally offered to return to work while the total number of Respondent's employees had increased by 76 employees. Finally, relying on *Beacon Upholstery Company, Inc.*, 226 NLRB 1360, 1367—68 (1976), Respondent contends that the interests of those employees who crossed the picket lines are diametrically opposed to those of the employees who remained on strike and were permanently replaced, and thus the nonstriking employees should not be presumed to support the Union.

C. *Discussion and Conclusions*

We agree with the General Counsel that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union as of November 5, 1977, and by refusing to furnish the Union with a copy of one of its health insurance plans as requested by the Union on or about July 8, 1977. We do so for the following reasons.

It is a well settled principle that a certified union enjoys an irrebuttable presumption of majority status for at least 1 year after certification.[3] After the expiration of the certification year, the presumption of a union's majority status continues but becomes rebuttable. An employer may rebut this presumption by affirmatively establishing that the union has, in fact, lost its majority status, or that it had sufficient objective bases for reasonably doubting the union's continuing majority status at the time that it withdrew recognition from the union. Assertion of such doubt, however, must be supported by objective considerations.[4] We find, as urged by the General Counsel, that Respondent has not demonstrated sufficient objective evidence to support its asserted doubt of the Union's majority status as of the time of Respondent's refusal to bargain with the Union.

In this regard, it is well established that new employees are presumed to support the Union in the same ratio as those whom they have replaced. See, e.g., *Windham Community Memorial Hospital, supra, Cutten Supermarket, supra,* and *Surface Industries, Inc.*, 224 NLRB 155 (1976). Furthermore, an employee's decision not to support a strike does not establish that he or she has rejected the union as

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[3] *Ray Brooks* v. *N.L.R.B.*, 348 U. S. 96, 98—104 (1954).

[4] *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965).

his or her collective-bargaining representative. *Cutten Supermarket, supra; Strange and Lindsey Beverages, Inc., and Dr. Pepper Bottling Co., Inc., Joint Employers d/b/a Pepsi-Cola-Dr. Pepper Bottling Co.*, 219 NLRB 1200 (1975); *King Radio Corporation, Inc.*, 208 NLRB 578 (1974), enfd. 510 F. 2d 1154 (10th Cir. 1975); *Frick Company*, 175 NLRB 233, fn. 1 (1969), enfd. 423 F. 2d 1327 (3d Cir. 1970). Additionally, unlike *Beacon Upholstery, supra*, cited by Respondent, here the unit composition has not been altered by the lawful discharge of striking employees thus undercutting the presumption of union majority support. Accordingly, we find that since Respondent has presented no other independent objective evidence supporting its asserted belief that the Union no longer represented a majority of its employees at the time it refused to bargain, Respondent has not rebutted the presumption of the Union's continuing majority status.

In view of the foregoing, we conclude that by refusing to recognize and bargain with the Union concerning a collective-bargaining agreement, and by refusing to supply the Union with a copy of one of its health insurance plans,[5] Respondent has violated Section 8(a)(5) and (1) of the Act. Further, although there can be no certitude that a collective-bargaining contract would have been agreed upon had Respondent not refused to bargain, such refusal to recognize or meet and bargain with the Union clearly precluded any possibility of reaching agreement on a contract and tended to impede any possible settlement of the strike. Accordingly, we agree with the General Counsel that Respondent's refusal to bargain converted the Union's economic strike into an unfair labor practice strike as of November 5, 1977. Therefore, on that date, the strikers assumed the status of unfair labor practice strikers.

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[5]See, e.g., *The Nestle Company, Inc.*, 238 NLRB No. 19 (1978).

CONCLUSIONS OF LAW

1. Pennco, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America, ALF–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All production and maintenance employees employed by Respondent at its Ashland, Kentucky, plant, including truck drivers, and lead people; but excluding all office clerical employees, confidential employees, technical employees, and all professional employees, guards and supervisors as defined in the Act.

4. At all times material herein the Union has been and is the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) and Section 8(a)(5) of the Act.

5. Since on or about November 5, 1977, and continuing to date, by refusing to recognize and bargain with the Union concerning a collective-bargaining agreement, and since on or about July 8, 1977 and continuing to date, by refusing to furnish the Union with a copy of one of its health insurance plans as requested by the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The strike which commenced on May 18, 1977, was converted to an unfair labor practice strike on November 5, 1977, the date Respondent unlawfully withdrew recognition and refused to bargain with the Union.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action which we find necessary to effectuate the policies of the Act.

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, recognize and bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. We additionally shall order Respondent to furnish the Union with a copy of one of its two health insurance plans as requested by the Union.

Having found that Respondent's refusal to bargain with the Union converted the strike to an unfair labor practice strike on November 5, 1977, we shall order that all striking employees who were not permanently replaced before that date be reinstated, upon their unconditional request, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, previously enjoyed, discharging, if necessary, any replacements hired after November 5, 1977; and that it make whole such employees for any loss of earnings resulting from its failure to reinstate them within 5 days of their unconditional request, with interest thereon to be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

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[6]See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

If Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.[7] Such employees for whom no employment is immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for placement on such list is to be determined by seniority or some other nondiscriminatory test. See, *Cutten Supermarket, supra.*

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pennco, Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its Ashland, Kentucky, plant, including truck drivers, and lead people; but excluding all office clerical employees, confidential employees, technical employees, and all professional employees, guards and supervisors as defined in the Act.

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[7] See *Newport News Shipbuilding & Dry Dock Company*, 236 NLRB No. 218 (1978).

(b) Refusing to furnish the Union with a copy of one of its health insurance plans as requested by the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which we find necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, concerning rates of pay, wages, hours or other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Furnish the Union with a copy of one of its health insurance plans as requested by the Union.

(c) Reinstate, upon unconditional request, all strikers who were not permanently replaced before November 5, 1977, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after November 5, 1977; and make such employees whole for any loss of earnings resulting from its failure to reinstate them within 5 days of their unconditional request in the manner set forth in the section of this Decision entitled "The Remedy." Such employees for whom no employment is available shall be placed on a preferential hiring list based upon seniority, or some other nondiscriminatory test, for employment as jobs become available.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its plant in Ashland, Kentucky, copies of the attached notice marked "Appendix."[8] Copies of said notice on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. May 23, 1979

John A. Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(Seal) National Labor Relations Board

[8]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to recognize and bargain collectively with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by us at our plant in Ashland, Kentucky, including truck drivers, and lead people; but excluding all office clerical employees, confidential employees, technical employees, and all professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with a copy of one of our health insurance plans as requested by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights as guaranteed by Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described above, concerning rates of pay, wages, hours, or other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

WE WILL furnish the Union with a copy of one of our two health insurance plans as requested by the Union.

WE WILL reinstate, upon unconditional request, all strikers who were not permanently replaced before November 5, 1977, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after November 5, 1977; and make such employees whole for any loss of earnings resulting from our failure to reinstate them within 5 days of their unconditional request, with interest. WE WILL place employees for whom no employment is available on a preferential hiring list based upon seniority or some other nondiscriminatory test, for employment as jobs become available.

Dated_____

PENNCO, INC.
(Employer)

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3663.

APPENDIX D

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

PENNCO, INC.
and
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO } Case 9-CA-12040

SUPPLEMENTAL DECISION AND ORDER

On May 23, 1979, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding wherein it found that Respondent Penneo, Inc., had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to recognize or meet and bargain with the Union and by refusing to supply the Union with a copy of one of its two health insurance plans. The Board ordered that Respondent cease and desist therefrom and take certain affirmative action to remedy the unfair labor practices.

The Board, *sua sponte,* has decided to reconsider its original Decision and Order to the extent set forth below. By letter dated August 15, 1979, all parties were informed of this decision to reconsider the original Decision and Order, and were requested to execute a supplemental stipulation. The supplemental stipulation was received by the Board on October 26, 1979.

In our original Decision, we rejected Respondent's defense that its asserted good faith doubt of the Union's ma-

[1] 242 NLRB No. 73.

jority status rendered its refusal to bargain lawful. In this regard, Respondent contended that it had presented evidence of objective considerations sufficient to support its asserted good faith doubt including, *inter alia*, evidence of employee turnover and evidence that during the economic strike some employees, including strike replacements and new employees, crossed the union picket line.

As set forth more fully in our earlier Decision, the Union began an economic strike on May 18, 1977, at Respondent's Ashland, Kentucky, plant and established a picket line. As a result of incidents on the picket line the Boyd Circuit Court of Boyd County, Kentucky, issued a restraining order in July 1977.

During the last pay period prior to the strike, Respondent employed 173 bargaining unit members. By November 3, 1977, the pay period after the expiration of the 1-year certification period, there were 257 employees in the bargaining unit on the payroll, of who 47 had been on the payroll prior to the strike. All the employees working in Respondent's plant during the strike had to cross the union picket line.

Respondent withdrew recognition from the Union in November 1977. The strike continued until September 15, 1978, when the Union removed its pickets and 42 employees unconditionally offered to return to work. At no time between November 1, 1976, and the time of the hearing in this case did the Union abandon the bargaining unit or relinquish its interest in negotiating a collective bargaining agreement on behalf of unit employees.

In addition to the facts set forth in our earlier Decision, the parties have stipulated that 109 employees failed to report to work upon commencement of the strike and 109 employees remained on strike when Respondent withdrew recognition. Further, all of the striking employees—and 25 employees who left their employment with Respondent

between May 18 and November 5, 1977, for reasons other than the strike—were replaced by Respondent prior to the withdrawal of recognition. The parties state that they have no affirmative evidence that any strikers abandoned their status as strikers as of the time recognition was withdrawn.

In our original Decision, we found that since the evidence presented by Respondent was insufficient to support its asserted good faith doubt of the Union's majority status, Respondent had not rebutted the Union's continuing presumption of majority status. Upon reconsideration of our original Decision and consideration of the further stipulation of the parties, we reaffirm our previous Decision for the reasons set forth below.

As stated in our earlier Decision, absent unusual circumstances, a union is irrebuttably presumed to enjoy majority status during the first year following its certification[2]. Upon expiration of the certification year, the presumption of majority status continues but becomes rebuttable.[3] An employer who wishes to withdraw recognition from a certified union after a year may rebut the presumption in one of two ways: (1) by showing that on the date recognition was withdrawn, the union did not in fact enjoy majority support, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the

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[2] *Ray Brooks* v. *N.L.R.B.*, 348 U. S. 96, 98—104 (1954).

[3] *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F. 2d 850 (5th Cir. 1978), enfg. 233 NLRB 1087 (1978); *N.L.R.B.* v. *Windham Community Memorial Hospital and Hatch Hospital Corporation*, 577 F. 2d 805 (2d Cir. 1978), enfg. 230 NLRB 1070 (1977); *N.L.R.B.* v. *Frick Company*, 423 F. 2d 1327 (3d Cir. 1970), enfg. 175 NLRB 233 (1969); and *Celanese Corporation of America*, 95 NLRB 664 (1951), cited with approval in *Ray Brooks* v. *N.L.R.B.*, *supra*.

union's majority status at the time the employer refused to bargain.[4]

The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. Thus, Section 9 of the Act gives the Board authority to supervise elections and to certify as the exclusive collective bargaining representative a labor organization which wins an election and "inherent in any successful administration of such a system is some measure of permanence in the results. . . ."[5] The resulting industrial stability remains a primary objective of the Wagner Act, and to an even greater extent, the Taft-Hartley Act.[6] Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support.

As set forth above, the employer after the certification year may rebut the presumption of majority status with less than actual proof that a union lacks majority support by establishing objective evidence forming a reasonable basis for a good faith doubt of that status. However, in

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[4] *Retired Persons Pharmacy* v. *N.L.R.B.*, 519 F. 2d 486 (2d Cir. 1975), enfg. 210 NLRB 443 (1974); *Allied Industrial Workers, AFL-CIO, Local Union No. 289 [Cavalier Division of Seeburg Corporation]* v. *N.L.R.B.*, 476 F. 2d 868 (D.C. Cir. 1973), enfg. 192 NLRB 290 (1971); *Terrell Machine Company* v. *N.L.R.B.*, 427 F. 2d 1088 (4th Cir. 1970), enfg. 173 NLRB 1480 (1969).

[5] *N.L.R.B.* v. *Century Oxford Mfg. Corporation*, 140 F. 2d 541, 542 (2d Cir. 1944), enfg. 47 NLRB 835 (1943).

[6] *N.L.R.B.* v. *Brooks*, 204 F. 2d 899 (9th Cir. 1953), enfg. 98 NLRB 976 (1952), affd. *Ray Brooks* v. *N.L.R.B.*, 348 U. S. 96 (1954).

light of the dual policies underlying the presumption, the employer's burden is a heavy one. Thus, "It is insufficient . . . that the employer merely intuits nonsupport,"[7] and good faith doubt "may not depend solely on unfounded speculation or a subjective state of mind."[8]

A corollary of the overall presumption of continuing majority status is that, again absent evidence to the contrary, new employees are presumed to support the incumbent union in the same ratio as those they replace.[9] Respondent contends, however, that it had sufficient objective evidence to establish its good faith doubt of majority status since its new employees should be presumed *not* to support the Union because they crossed the union picket line. The thrust of this argument is either that the presumption of majority status does not extend to employees in the event of a strike, or that that presumption may be rebutted by the countervailing presumption that Respondent would have us adopt.

We reject Respondent's contentions. Clearly, Respondent is in error if it is contending that the presumption of majority status does not apply in the event of a strike where strike replacements and other new employees cross a picket line. The Board has long held that this presumption applies as a matter of law, and it is incumbent upon Respondent to rebut it even, and perhaps especially, in the event of a strike. Similarly, Respondent is in error if it is urging the Board to permit it to rebut the presumption of

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[7] *J. Ray McDermott and Co., Inc.* v. *N.L.R.B.*, *supra* at 859.

[8] *N.L.R.B.* v. *Gulfmont Hotel Company*, 362 F. 2d 588 (5th Cir. 1966), enfg. 147 NLRB 997 (1964).

[9] *King Radio Corporation*, 208 NLRB 578 (1974); *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965). See also *N.L.R.B.* v. *Washington Manor, d/b/a Washington Manor Nursing Center (North)*, 519 F. 2d 750 (6th Cir. 1975), enfg. 211 NLRB 324 (1974).

majority status with its own presumption for it "misconceives the nature of the employer's burden of proof . . . this burden can be sustained only by objective evidence and presumptions do not provide such evidence."[10] Certainly in non-strike circumstances Respondent would be required to rebut the presumption of majority status based on objective evidence, and we see no persuasive reason to make an exception here.

Indeed, the policies which underlie the heavy burden of proof imposed on an employer in order to rebut the presumption of continuing majority status are particularly compelling when a strike is involved. In this regard, the right of employees to engage in concerted activities such as economic strikes is protected, *inter alia*, by Sections 7 and 13 of the Act, and thus is deeply embedded in the law we are charged with administering. As the Supreme Court has stated, the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[11] Although employees have the right to engage in economic strikes they exercise this right at the risk of permanent replacement. Respondent, in effect, is asking us to add to this risk the potential additional loss of the employees' collective bargaining representative based solely on a presumption Respondent would have us draw. Thus, adoption of Respondent's presumption would allow an employer to withdraw recognition and eliminate a union as its employees' representative as soon as an economic strike commences and a number of employees equivalent to the number on strike are willing to cross a

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[10] *N.L.R.B.* v. *Windham Community Memorial Hospital*, *supra* at 813.

[11] *N.L.R.B.* v. *Insurance Agents' International Union AFL-CIO* [*Prudential Insurance Co.*], 361 U. S. 477 (1960).

picket line. Such an additional burden on the employees' right to strike would effectively impair that right, and disturb the delicate balance of competing weapons which the Board and the courts have recognized in the labor relations arena.

Further, the presumption that Respondent urges us to adopt is not a persuasive one. In this regard, the Board has held, with court approval, that an employee's return to work during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining representative.[13] Absent supporting evidence it may mean no more than that he was forced to return to work for financial reasons or that he did not support that particular strike.[13] Similarly, the Board, with court approval, has held that a replacement hired for a striking employee cannot, without more, be presumed to reject the union as his bargaining representative.[14] Such a worker also may be compelled to seek employment, or may disapprove of the strike in question, but would support other union initiatives.[15] Thus, in light of this uncertainty as to the reasons employees cross a picket line, Respondent's presumption alone is clearly not sufficient to rebut the presumption of majority status nor its corollary that new employees, including strike replacements, are presumed to support the Union in the same ratio as those they replace.

Finally, we note that Respondent has offered no other evidence supporting a "presumption" that the union lost its majority status. Thus, it has not shown that any of its

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[12] *N.L.R.B.* v. *Frick Co., supra.*

[13] *Industrial Workers Local 289* v. *N.L.R.B., supra.*

[14] *Rogers Manufacturing Co.* v. *N.L.R.B.*, 486 F. 2d 644 (6th Cir. 1973), enfg. 197 NLRB 1264 (1972).

[15] See *N.L.R.B.* v. *Windham Community Memorial Hospital, supra.*

employees who crossed the picket line, in fact, did not support the Union.[16] This lack of corroborative evidence further undermines the utility of the inference Respondent would have us draw and its assertion of good faith doubt of majority status.[17]

In view of the foregoing, we conclude that Respondent has failed to meet its burden of establishing a good faith doubt based on objective considerations of the Union's majority status as of the time it withdrew recognition from

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[16]Although Respondent emphasizes the fact that only 42 striking employees sought reinstatement at the conclusion of the strike, Respondent withdrew recognition from the Union approximately 10 months prior to the end of the strike and so cannot rely on the number of strikers offering to return to work as an objective consideration underlying its asserted good faith doubt at the time it withdrew recognition.

Respondent additionally contends that some incidents of violence which occurred on the picket line crossed by its employees rendered the support of these employees for the Union even more unlikely. However, in view of the speculative nature of the employees' reasons for crossing the picket line, the occurrence of some violence on the picket line is, at best, one factor weakening the presumption of majority status but not alone rebutting it.

[17]We note, as we did in our earlier Decision in this case, that this case is distinguishable from *Beacon Upholstery Company, Inc.*, 226 NLRB 1360 (1976). In that case striking employees had been lawfully discharged and were no longer in the bargaining unit. Here, the bargaining unit is composed of striking employees and their replacements. See, e.g., *C.H. Guenther & Son, Inc., d/b/a Pioneer Flour Mills*, 174 NLRB 1202 (1969). Thus, their interests are not as divergent as those of the two groups in *Beacon Upholstery*. Accordingly, we are unwilling to presuppose, as Respondent would have us do, that the Union would be unable to accommodate the apparently conflicting interests of the striking and nonstriking employees, particularly in light of the Union's statutory duty of fair representation requiring it to serve the interests of all bargaining unit employees fairly and in good faith. See, *Vaca, et al.* v. *Sipes*, 285 U. S. 895 (1967).

the Union. Accordingly, we affirm our previous Decision and Order in which we found that Respondent's withdrawal of recognition from the Union and refusal to supply the Union with a copy of one of its two health insurance plans were violative of Section 8(a)(5) and (1) of the Act.

SUPPLEMENTAL ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order as contained in its original Decision and Order, issued May 23, 1979, in this proceeding.

Dated, Washington, D. C., July 18, 1980.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

John C. Truesdale, Member

(Seal) National Labor Relations Board

APPENDIX E

Excerpt From Labor-Management Relations 29 U.S.C. 158(a)(1) and (5)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective

date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided, further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-1654

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner,*

v.

PENNCO, INC., - - - - - - - *Respondent.*

ORDER—Filed April 16, 1982

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

(s) JOHN P. HEHMAN
Clerk

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2103

In the Supreme Court of the United States

OCTOBER TERM, 1981

PENNCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner unlawfully withdrew recognition from a union without having sufficient evidence to support a reasonable and good faith belief that the union no longer represented a majority of petitioner's employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2103

PENNCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-23) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 25-39) are reported at 242 N.L.R.B. 467. The Board's supplemental decision and order (Pet. App. 40-48) are reported at 250 N.L.R.B. 716.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1982. A timely petition for rehearing was denied on April 8, 1982 (Pet. App. 24). The petition for a writ of certiorari was filed on May 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 49-50.

STATEMENT

1. Communications Workers of America, AFL-CIO ("the Union") was certified on November 1, 1976, as the bargaining representative of petitioner's production and maintenance employees after winning a Board election by a vote of 114 to 62 (Pet. App. 19-20). Between December 1976 and September 1977 the parties held 12 bargaining sessions, but were unable to reach agreement on a contract (*id.* at 20, 28). Meanwhile, on May 18, 1977, the Union began an economic strike and picketed petitioner's plant. Of the 173 employees in the bargaining unit, 109 failed to report to work at the commencement of the strike. Because of incidents on the picket line, a local court issued a restraining order in July 1977. (*Id.* at 20.)

In early November 1977, just over a year after the Union's certification, petitioner refused to negotiate further with the Union, contending that it had a good faith doubt of the Union's majority status (*ibid.*; *id.* at 28). At that time, there were 257 employees working within the bargaining unit, all but 47 of whom were hired after the strike began. All of the 109 striking employees were still on strike and had been replaced (*id.* at 20; 41-42).

The strike continued until September 15, 1978, when the Union removed its pickets and 42 employees offered unconditionally to return to work. At no time did the Union abandon the bargaining unit or relinquish its interest in negotiating a contract on behalf of the unit employees. (*Id.* at 20, 29.)

2. The Board found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from the Union without having sufficient objective evidence to support a good faith doubt of the Union's majority status.[1] The Board noted that new employees are presumed to support the union in the same ratio as those whom they have replaced, that the fact that an employee crosses a picket line and works during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining representative, and that petitioner had offered no evidence that any of the employees who crossed the picket line did not, in fact, support the Union. (*Id.* at 31-33, 42-48.) The Board further found that the unlawful withdrawal of recognition converted the economic strike into an unfair labor practice strike (*id.* at 32).

3. The court of appeals enforced the Board's order. Noting that petitioner's doubt as to the Union's majority status was based solely on its view that employees who crossed a picket line marred by violence should be presumed not to support the union, the court found that, under the stipulated facts, this presumption was not justified. The picket line violence had ended three and a half months earlier, and the record did not show how many of the employees working when recognition was withdrawn had been working at the time of the violence.[2] Moreover, since fewer than half of the 257 employees working at the time recognition was withdrawn would have to be fired to make room for the

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[1] The Board also found that petitioner violated Section 8(a)(5) and (1) by refusing to supply the Union with a copy of one of its health insurance plans (Pet. App. 32). Petitioner concedes (Pet. 5 n.6) that this finding is proper if the finding that the withdrawal of recognition was unlawful is upheld.

[2] The court left "to another day the case where picket line violence occurs close to the day of withdrawal" of recognition (*id.* at 22).

returning strikers, and since there was no indication that any of the working employees knew that they would lose their jobs if the strikers returned, it could not be presumed that those employees would oppose the Union in order to protect their jobs. Accordingly, the court concluded that petitioner had not produced sufficient objective evidence of doubt as to the Union's majority status to shift the burden to the Board to prove that the Union actually had majority status. (Pet. App. 22-23.)

ARGUMENT

1. Petitioner does not challenge the settled principle that the presumption that a certified union represents a majority of the unit employees—irrebutable for one year after certification (*Brooks* v. *NLRB*, 348 U.S. 96, 98-102, 104 (1954))—continues thereafter unless it is rebutted by objective evidence of a reasonable and good faith doubt that the union has maintained its majority status. See, *e.g.*, *NLRB* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (5th Cir. 1966); *NLRB* v. *Rish Equipment Co.*, 407 F. 2d 1098, 1101 (4th Cir. 1969); *Pioneer Inn Associates* v. *NLRB*, 578 F. 2d 835, 839 (9th Cir. 1978).[3] Petitioner introduced no evidence that any of the 366 unit employees—strikers, non-striking employees, striker replacements, or other newly hired employees (see note 8, *infra*)—had indicated opposition to the Union prior to the withdrawal of recognition. Petitioner

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[3]Petitioner relies (Pet. 11-12) on language in *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1445 (1959), as suggesting that the employer should not be required to prove lack of majority status because proof of such status is peculiarly within the competence of the union. However, *Stoner Rubber* expressly holds that the burden shifts to the General Counsel to prove the union's majority status only when the employer overcomes the presumption of majority by producing sufficient evidence to raise a serious doubt of the union's continued majority status (*ibid.*). The Board and the court of appeals found in this case that such evidence had not been produced.

contends, however, that the fact that its striker replacements and non-striking employees crossed a picket line at which violence occurred, in order to go to work, supplied the requisite basis for doubting the Union's majority status. The holding of the Board and the court of appeals that, in the circumstances of this case, these factors were insufficient to sustain petitioner's burden of establishing a reasonable good faith doubt as to the Union's continued majority status presents no issue warranting review by this Court.[4]

The courts have held that an employee's failure to join a strike, or his return to work while the strike is still in progress, is insufficient, standing alone, to show the employee's opposition to the union. *NLRB* v. *Windham Community Memorial Hospital*, 577 F. 2d 805, 814 (2d Cir. 1978); *Rogers Manufacturing Co.* v. *NLRB*, 486 F. 2d 644, 647 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974); *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F. 2d 380, 394 (D.C. Cir. 1972); *NLRB* v. *Frick Co.*, 423 F. 2d 1327, 1333-1334 (3rd Cir. 1970); *Komatz Construction, Inc.* v. *NLRB*, 458 F. 2d 317, 322 (8th Cir. 1972). Absent evidence to the contrary, crossing the picket line is as consistent with opposition to the particular strike, or with having to work for financial reasons, as with opposition to

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[4]Petitioner also contends (Pet. 9, 11) that the court of appeals departed from its own prior decisions. Even if this were true, such an intra-circuit conflict would not warrant review by this court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Moreover, the two prior Sixth Circuit cases relied on by petitioner are clearly distinguishable. In *Automated Business Systems* v. *NLRB*, 497 F. 2d 262, 270 n.6 (1974), the employer's refusal to bargain was held justified by the fact that a decertification petition had been filed and that the employer was informed that a majority of the employees supported the petition. In *NLRB* v. *Triplett Corp.*, 619 F. 2d 586, 587 (1980), withdrawal of recognition was based on a number of objective considerations, including the resignation of many employees from the union.

the union. *Allied Industrial Workers, Local 289* v. *NLRB*, 476 F. 2d 868, 881 (D.C. Cir. 1973).

2. Nor is a different conclusion required by the cases relied on by petitioner (Pet. 10, 15-17), which hold that striker replacements stand on a different footing from other employees who cross a picket line, because their jobs would be lost if the union prevailed and the strikers returned. These cases are factually distinguishable from the situation here.

In *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203, 1205-1206 (8th Cir. 1979) (Pet. 10, 15-16), the entire ten-person workforce was replaced by permanent replacements who crossed the striking employees' picket line to get to work. Similarly, in *Soule Glass and Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1110 (1st Cir. 1981) (Pet. 17), the replacements outnumbered the striking employees.[5] And in *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F. 2d 720, 728-729 (5th Cir. 1978) (Pet. 15, 16-17), a majority of the workforce at the time the employer expressed a doubt of the union's majority consisted of permanent replacements and strikers who had returned to work, and there was specific evidence of employee defections from the union.[6] Even if the presumption of majority status is rebutted where striker replacements constitute a majority of the

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[5]Moreover, in *Soule*, there was independent evidence that the replacements did not want to be represented by the union; "the great majority of the replacements testified that they in fact wanted nothing to do with [the union] and preferred a nonunion shop" (652 F. 2d at 1111).

[6]The court noted that "[t]he Company had received copies of Union resignation letters from 19 returning strikers and had received information that other reinstatements had also resigned from the Union" (584 F. 2d at 728 (footnote omitted)). In addition, "the Company had been informed by a Union representative that '50 to 25 or 20%' of the strikers would not be returning to work" (*ibid.*).

bargaining unit, it does not follow that the same conclusion is warranted where, as here, the replacements constituted only a minority of the unit employees.[7]

Here, when petitioner withdrew recognition from the Union, the bargaining unit consisted of 366 employees,[8] of whom, at most, 109 were striker replacements. Even if it be assumed that all the replacements opposed the Union, they were only 30 percent of the unit employees. Under settled principles, such a percentage is insufficient to establish a reasonable doubt as to the Union's majority status. See *Cain's Generator & Armature Co. Inc.*, 237 N.L.R.B. 1198, 1201 (1978), enforced, 628 F. 2d 933 (6th Cir. 1980) (expressions of opposition to union by 9 of 23 unit employees insufficient); *Dy-Dee Wash, Inc.*, 228 N.L.R.B. 389, 390 (1977) (expressions of dissatisfaction by 2 or 3 of 7 unit employees insufficient); *San Luis Obispo County Restaurant and Tavern Association*, 196 N.L.R.B. 1082, 1087 (1972) (anti-union petitions signed by 94 of 304 unit employees insufficient).

Finally, the court of appeals correctly concluded that the picket line violence which occurred here did not furnish petitioner a valid basis for doubting the Union's continued majority status. As the court noted (Pet. App. 22), the violence cited by petitioner occurred early in the strike and ended three and a half months before the withdrawal of

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[7] Indeed, where replacements were less than half the bargaining unit, the First Circuit has found a withdrawal of recognition unlawful. *NLRB* v. *Crimptex, Inc.*, 517 F. 2d 501, 505 (1975).

[8] For the purpose of determining the Union's continued majority status, the strikers, even though replaced, must be considered part of the bargaining unit. *C.H. Guenther & Son, Inc.* v. *NLRB*, 427 F. 2d 983, 987 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *NLRB* v. *Crimptex, Inc.*, *supra*, 517 F. 2d at 503; *NLRB* v. *Windham Community Memorial Hospital*, *supra*, 577 F. 2d at 813.

recognition. Moreover, the record does not show how many employees working when recognition was withdrawn had crossed the picket line during the violence.

3. Contrary to petitioner's contention (Pet. 10, 13), the Board's position does not mean that employees whose interests are opposed to those of the strikers are locked into representation by a union which does not represent their interests. If replacements and nonstriking employees wish to oust the incumbent union, they are free to file a decertification petition. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969). The court below has held that a decertification petition signed by a majority of the unit employees may justify a refusal to bargain. See *Automated Business Systems* v. *NLRB*, 497 F. 2d 262, 270 n.6 (6th Cir. 1974). Here, however, no decertification petition was filed, and there is no evidence that any employees, let alone a majority, indicated to petitioner that they opposed the Union. Thus, to the extent that petitioner is relying on the right of its employees to reject representation, it is relying on a right which no employee has asserted. Under these circumstances, as this Court has observed, "[t]o allow employers to rely on employees' rights in refusing to bargain with the [certified] union is not conducive to [industrial peace], it is inimical to it." *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1982

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